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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

CENTURY INDEMNITY COMPANY, a
Pennsylvania corporation,

Plaintiff,

v.

THE MARINE GROUP, LLC, a California limited
liability company, as affiliated with
NORTHWEST MARINE, INC., an inactive
Oregon corporation, as affiliated with

Case No. 08-CV-01375-AC

**TRIAL BRIEF ON DUTY TO DEFEND
AND ALLOCATION OF DEFENSE OF
THIRD-PARTY DEFENDANT
ARGONAUT INSURANCE COMPANY**

**TRIAL BRIEF ON DUTY TO DEFEND AND
ALLOCATION OF DEFENSE OF THIRD-PARTY
DEFENDANT ARGONAUT INSURANCE
COMPANY**

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NORTHWEST MARINE IRON WORKS, an
inactive Oregon corporation,

Defendants

THE MARINE GROUP, LLC, a California limited
liability company, as affiliated with
NORTHWEST MARINE, INC., an inactive
Oregon corporation, as affiliated with
NORTHWEST MARINE IRON WORKS, an
inactive Oregon corporation; and BAE SAN
DIEGO SHIP REPAIR, INC., a California
corporation,

Third-Party Plaintiffs

v.

AGRICULTURE INSURANCE COMPANY, and
AGRICULTURAL SURPLUS AND EXCESS
COMPANY, each an Ohio corporation;
AMERICAN CENTENNIAL INSURANCE
COMPANY, a Delaware corporation; CHICAGO
INSURANCE COMPANY, an Illinois corporation;
CONTINENTAL INSURANCE COMPANY, a
Pennsylvania corporation; EMPLOYERS
MUTUAL CASUALTY COMPANY, an Iowa
corporation; FEDERAL INSURANCE
COMPANY, an Indiana corporation; GRANITE
STATE INSURANCE COMPANY, a Pennsylvania
corporation; HARTFORD FIRE INSURANCE
COMPANY, a Connecticut corporation;
INDUSTRIAL INDEMNITY COMPANY, a
Delaware corporation; INSURANCE COMPANY
OF THE STATE OF PENNSYLVANIA, a New
Jersey corporation; INSURANCE COMPANY OF
NORTH AMERICA, a Pennsylvania corporation;
CERTAIN UNDERWRITERS AT LLOYD'S
LONDON, and CERTAIN LONDON MARKET
INSURANCE COMPANIES, each a foreign
corporation; NATIONAL UNION FIRE
INSURANCE COMPANY OF PITTSBURGH,
P.A., a Pennsylvania corporation; NEW
ENGLAND REINSURANCE CORPORATION, a
Connecticut corporation; OLD REPUBLIC
INSURANCE COMPANY, an Illinois corporation;
PACIFIC MUTUAL MARINE OFFICE INC., a
New York corporation; ROYAL INDEMNITY
COMPANY, a Delaware corporation; ST. PAUL
FIRE AND MARINE INSURANCE COMPANY, a
Minnesota corporation; TWIN CITY FIRE

**TRIAL BRIEF ON DUTY TO DEFEND AND
ALLOCATION OF DEFENSE OF THIRD-PARTY
DEFENDANT ARGONAUT INSURANCE
COMPANY**

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INSURANCE COMPANY, an Indiana corporation;
WATER QUALITY INSURANCE SYNDICATE,
a syndicate of foreign corporations; WEST COAST
MARINE MANAGERS, INC., a New York
corporation; and JOHN DOE INSURANCE
COMPANIES,

Third-Party Defendants.

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Pursuant to this Court's May 6, 2015 Bench Trial Management Order (Docket 708), Third-Party Defendant Argonaut Insurance Company ("Argonaut") submits the following trial brief.

I.

FACTUAL BACKGROUND AND SUMMARY OF ARGUMENT

Phase I of the trial in this case is set for November 4, 2015. It concerns, first, the obligations of several insurance companies to defend third-party plaintiffs, The Marine Group, LLC; Northwest Marine, Inc.; Northwest Marine Iron Works; and BAE Systems San Diego Ship Repair, Inc. ("TPPs"); for defense fees and costs incurred in connection with the assessment, removal, and remediation of hazardous materials released at the Portland Harbor Superfund Site ("Portland Harbor"). The Phase I trial also concerns, second, the issue of allocation between and among those insurance companies, by percentages or other measured and calculated shares, of the cost of those defense obligations found to exist on the part of the insurance companies.

Determining each insurance carrier party's duty to defend will require the Court to identify specific insurance policies, construct or reconstruct certain lost policies, and construe their terms, fix the time period for which each policy provided coverage, determine the existence and applicability, if any, of exclusions, and the like. Upon determination of each insurance carrier party's duty to defend, the issue of allocation of that collective duty to defend between and among the carriers found to have that duty, will then require the Court to engage in a calculation of the respective shares of the defense owed by each, as between and among them.

On September 11, 2015 the Court issued its Opinion and Order granting and denying certain motions for summary judgment and/or partial summary judgment which had been

brought by various insurance company parties.¹ The effect of the Court's rulings on those motions was to leave, in addition to the TPPs, only four (4) insurance carrier parties remaining for, or with a stake in, the trial set for November 4, 2015. Those four carriers are: 1) St. Paul Fire and Marine Insurance Company, individually and as successor to St. Paul Mercury Indemnity Company ("St.Paul"); 2) Argonaut; 3) Insurance Company of North America ("INA"); and 4) Great American Assurance Company, formerly known as Agricultural Insurance Company, and Great American E&S Insurance Company, formerly known as Agricultural Excess and Surplus Insurance Company (collectively, "Great American").

Each of those four carriers issued policies of primary comprehensive or commercial general liability insurance to TPPs, or their predecessors-in-interest, which policies provided coverage during the pertinent period from February 11, 1954 to July 1, 1982. It is Argonaut's position that per the terms of their policies, each of the other three carriers, in addition to Argonaut, owe and owed TPPs a duty to defend the claims in issue here, namely the claims of the United States Environmental Protection Agency ("EPA"), the Oregon Department of Environmental Quality ("DEQ"), and others, for assessment, removal, and remediation of hazardous materials released at the Portland Harbor.

In terms of allocation, therefore, Argonaut contends that if the Court is to allocate purely on a time-on-risk basis, St. Paul should be allocated a share of seventy-two and twenty four one-hundredth percent (72.24%) of the defense, Argonaut should be allocated a share of twelve and four one-hundredths percent (12.04%) of the defense, INA should be allocated a share of seven and eighty-seven one-hundredth percent (7.87%) of the defense, and Great American should be allocated a share of seven and eighty-five one-hundredth percent (7.85%) of the defense. In the alternative, if the Court is to allocate on a time-on-risk basis times policy limits basis, St. Paul

¹ Dkt 817.

should be allocated a sixty-five and thirty-eight one-hundredth percent (65.38%) share of the defense, Argonaut should be allocated a ten and eighty-nine one-hundredth percent (10.89%) share of the defense, INA should be allocated an eleven and eighty-eight one-hundredth percent (11.88%) share of the defense, and Great American should be allocated an eleven and eighty-five one-hundredth percent (11.85%) share of the defense. Argonaut contends the Court should allocate in accordance with one or the other of the two alternative bases.

II.

ARGUMENT

1. **Duty To Defend:**

The insurance policies identified below obligate the respective insurers who issued them to defend Third-Party-Plaintiffs for defense fees and costs incurred and paid on their behalf in defending against the claims made by the EPA, the DEQ, and others, arising out of alleged pollution to the Portland Harbor (“Portland Harbor case”). To the extent that Argonaut has paid for the defense (fees and costs) of the TPPs in the Portland Harbor case, the Identified Parties and policies listed below are obligated to reimburse Argonaut for its defense-cost payments and to share in the payment of future defense costs as set forth further below.

Insurer Name	Policy #	Period Inception Date	Period Expiration Date	Stated Or Asserted Policy Limits
St. Paul	1419213	2/11/54	2/11/57	\$300,000
St. Paul	504JA1276	2/11/57	2/11/60	\$300,000
St. Paul	504JC3433	2/11/60	5/31/62	\$300,000
St. Paul	504JF2428	5/31/63	7/1/66	\$300,000
St. Paul	504JH5407	7/1/66	7/1/69	\$300,000
St. Paul	536JB5573	7/1/69	7/1/72	\$300,000
INA	ISG1001	7/1/78	7/1/79	\$500,000
INA	ISL1062	7/1/79	7/1/80	\$500,000
Great American	SL005754	7/1/80	7/1/81	\$500,000
Great American	GL0003655	7/1/81	7/1/82	\$500,000

On December 26, 2012 this Court found and held that under the first St. Paul policy identified in the chart above, and under each of the INA policies listed in the chart above, and under each of the Great American policies listed in the chart above, St. Paul, INA, and Great American each have a duty to defend TPPs here.² In doing so, the Court granted the motion of TPPs for clarification and reconsideration of the Court's prior Opinion and Order of January 27, 2012.³

In that latter prior Opinion and Order, this Court noted that both of the aforementioned policies of INA and Great American, and implicitly as well the first of the St. Paul policies, each identified in the chart above, contained an insuring and defense provision which states as follows:

The Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of [bodily injury or property damage] to which this insurance applies, caused by an occurrence and the Company shall have the right and duty to defend any suit against the Insured seeking damages on account of such bodily injury or property damage⁴

Thus, in granting the TPPs motion for clarification and reconsideration on December 26, 2012, the Court's Opinion and Order of that date was based on the finding, implicit or otherwise, that the first St. Paul policy identified in the chart above, and each of the INA policies listed in the chart above, and each of the Great American policies listed in the chart above, contained the same or substantially similar insuring and defense provision as set forth above and in the Court's Opinion and Order of January 27, 2012.

² Dkt 452, Opinion and Order of Dec. 26, 2012, p. 1.

³ Dkt 452, Opinion and Order of Dec. 26, 2012, p. 1, and Dkt 397, Opinion and Order of Jan. 27, 2012.

⁴ Dkt 397, Opinion and Order of Jan. 27, 2012, pps. 13-14.

The evidence at trial set to start November 4, 2015 will show that each of the other St. Paul policies listed above contained the same and/or substantially similar insuring and defense provision which served as the basis for the Court's Opinions and Orders of both January 27, 2012 and December 26, 2012. It is Argonaut's contention, therefore, that under each of the other policies of liability insurance listed in the chart above as having been issued by St. Paul, St. Paul also had a duty to defend.

2. Allocation:

Section (4)(a) of ORS 465.480 provides as follows:

An insurer that has paid all or part of an environmental claim may seek contribution from any other insurer that is liable or potentially liable to the insured and that has not entered into a good-faith settlement agreement with the insured regarding the environmental claim.

Relatedly, section (5) of ORS 465.480 provides as follows:

If a court determines that the apportionment of recoverable costs between insurers is appropriate, the court shall allocate the covered damages between the insurers before the court, based on the following factors:

- (a) The total period of time that each solvent insurer issued a general liability insurance policy to the insured applicable to the environmental claim;
- (b) The policy limits, including any exclusions to coverage, of each of the general liability insurance policies that provide coverage or payment for the environmental claim for which the insured is liable or potentially liable;
- (c) The policy that provides the most appropriate type of coverage for the type of environmental claim;
- (d) The terms of the policies that related to the equitable allocation between insurers; and
- (e) If the insured is an uninsured for any part of the time period included in the environmental claim, the insured shall be considered an insurer for purposes of allocation.

Argonaut has calculated, based on the inception dates and the expiration dates listed in the chart above for each and all of the St. Paul policies, that St. Paul insured the TPPs under those policies for a period of **6,715** days. Argonaut has also calculated, based on the inception date of June 8, 1972 and the expiration date of July 1, 1975 for its own policy in issue here, that Argonaut insured the TPPs under that policy for a period of **1,119** days. Argonaut has also calculated, based on the inception dates and the expiration dates listed in the chart above for each and all of the INA policies, that INA insured the TPPs under those policies for a period of **732** days. Finally, Argonaut has also calculated, based on the inception dates and the expiration dates listed in the chart above for each and all of the Great American policies, that Great American insured the TPPs under those policies for a period of **730** days.

In light of those number of days for each of the carriers (i.e., St. Paul, Argonaut, INA, and Great American), by adding each to the other to get a total (9,296 days), and then dividing each by that total, Argonaut has calculated what it believes should be the allocated shares of defense for each carrier, if the Court is to allocate purely on a time-on-risk basis, i.e., purely on the basis of the first factor set forth in section (5) of ORS 465.480. On that basis, the shares should be allocated as follows:

St. Paul	:	72.04% (6,715 / 9,296)
Argonaut	:	12.04% (1,119 / 9,296)
INA	:	7.87% (732 / 9,296)
Great American	:	<u>7.85%</u> (730 / 9,296)
Total	:	100%

Alternatively, if the Court is to allocate on a time-on-risk basis times policy limits basis, i.e., on the basis of both the first and second factors set forth in section (5) of ORS 465.480, Argonaut has calculated the percentage share which should be allocated to each carrier as well. In that regard, it is anticipated the evidence at trial will show that the limits of liability for each

of the St. Paul policies listed in the chart above is and should be \$300,000. The limits of liability stated in the Argonaut policy are \$300,000 for property damage liability. The limits of liability stated in each of the INA policies is \$500,000, and the limits of liability stated in each of the Great American policies is also \$500,000.

Multiplying those limits by the aforementioned number of days each carrier insured the TPPs, yields figures of \$2,014,500,000 for St. Paul, \$335,700,000 for Argonaut, \$366,000,000 for INA, and \$365,000,000 for Great American. By then adding together the resultant number for each of the four carriers involved here, a total figure of \$3,081,200,000 is reached. In turn, dividing each carrier's individual dollar number by that latter figure, yields the time on risk times policy limits percentages for each carrier, which Argonaut contends should be allocated as listed below:

St. Paul	:	65.38% (\$2,014,500,000 / \$3,081,200,000)
Argonaut	:	10.89% (\$335,700,000 / \$3,081,200,000)
INA	:	11.88% (\$366,000,000 / \$3,081,200,000)
Great American	:	<u>11.85%</u> (\$365,000,000 / \$3,081,200,000)
Total	:	100%

III.

CONCLUSION

Argonaut contends each of the carriers identified above have a duty to defend TPPs in connection with the claims of the EPA, the DEQ, and others, against the TPPs which related to contamination of the Portland Harbor. Argonaut also contends allocation of that defense between and among the carriers should be found either based on a time on the risk calculation or a time on the risk times policy limits calculation, as set forth above. None of the other factors listed under section (5) of ORS 465.480 apply or are relevant here. Thus, Argonaut also contends it has a right to contribution from each of the other three of the aforementioned carriers,

i.e., St. Paul, INA, and Great American, in accordance with one or the other of the allocation calculations set forth above.

Dated this 6th day of October, 2015.

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I hereby certify that I served a true copy of the foregoing **TRIAL BRIEF ON DUTY TO DEFEND AND ALLOCATION OF DEFENSE OF THIRD-PARTY DEFENDANT ARGONAUT INSURANCE COMPANY** on the following attorneys on the date noted below via the following method:

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